EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
AUG 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner

v.

KENNETH JAMES LODOWSKI,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Alan H. Murrell
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Tower Building - Fourth Floor
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Julia Doyle Bernhardt
Assistant Public Defender

Counsel for Respondent

INDEX

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	15
CONCLUSION	19

TABLE OF CITATIONS

Cases

Blanks v. State, ___ Ga. ___, 330 S.E.2d 575 (1985) 16

Dunn v. State, ___ S.W.2d ___, Texas Court of Criminal Appeals, No. 248-84 17

State v. Blanford, 306 N.W.2d 93 (Iowa 1981) 15

State v. Chase, 55 Ohio 2d 237, 378 N.E.2d 1064 (1978) 16

MISCELLANEOUS

Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo. L.J. 1 (1978) 16

NO. 85-23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner

v.

KENNETH JAMES LODOWSKI,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

At 11:45 p.m. on Saturday, June 11, 1983, Prince George's County policeman Carlton Fletcher and Ming Houng Phamdo, Assistant Manager of the Goddard Mini-Mart in Greenbelt, were shot and killed by two assailants, who robbed them of more than twenty thousand dollars. At the scene, investigators found a spent 20-gauge shotgun shell near Phamdo, two spent 20-gauge shells near Fletcher, and a shipping carton for a 20-gauge shotgun. Investigators traced the box to a J.C. Penney's store, where they learned that

the purchaser of the shotgun was Kamel Ali ElFadl, Respondent's co-defendant. Independently, the officers ascertained that Elfadl had been an employee of the Mini-Mart but had been transferred after being suspected of a $16-18,000 larceny.

At 3:00 p.m. on Sunday, June 12, 1983, on the instructions of Detective Daniel Statkus, three police cars converged, lights flashing, on a car driven by Elfadl, and stopped it. One officer had his gun drawn at his side. Detective Steven Ricker asked for Elfadl's license and, forgetting to return it, placed it in his shirt pocket, and asked Elfadl to accompany him to the police station. Ricker said Elfadl agreed and was placed in the rear seat of Ricker's cruiser. Elfadl's car was left at the scene. Upon arriving at the police station approximately fifteen minutes later, Detective Ricker turned Elfadl's license over to Detective Statkus, who kept it because he was not part of the interviewing process that day. Elfadl was placed in an interview room where he was interviewed by Ricker for approximately one hour and a half.

Detective Hatfield took over the interviewing of Elfadl at 5:40 p.m. Elfadl was not advised of his Miranda rights at that time or at any time in the ensuing interview because he was not "at that point in time actually in an accusatory status." In the course of the interview, Elfadl, a Moslem, indicated that that particular date was a religious feast, and at his request, officers Steven Ricker and

Daniel Murphy transported him to his apartment to pray and eat. They remained with him, kept him under constant observation, and transported him back to the Criminal Investigation Division at between 9:30 p.m. and 9:45 p.m. Hatfield then resumed his interview with Elfadl. Sometime prior to 1:30 a.m. on June 13, the substance of the interview was reduced to writing and signed by Elfadl.

At 1:00 a.m., Detective Hatfield summoned a polygraph operator, who was told that Elfadl was a suspect whom the police wished "to rule out or decide what [they] were going to do with him." Elfadl, the police said, agreed to the polygraph after being advised of his right not to take it. He signed a waiver to that effect at 3:25 a.m. The polygraph examination evidently lasted until shortly after 6:00 a.m. on June 13. He was then interviewed by a number of other officers until approximately 3:00 p.m., at which time he was considered a suspect. Throughout the period, however, according to the officers, Elfadl was free to leave. Detectives Ricker and Edgar drove Elfadl to his apartment at 4:00 p.m. on June 13 and obtained his consent to search the apartment. In the search the officers recovered shotgun shells, receipts, and an address book. The officers left Elfadl at his apartment. Detective Hatfield placed Elfadl under constant surveillance by the Special Operations Division.

On June 12, Detective Edgar learned from Elfadl's landlady that Respondent was Elfadl's former roommate and that while she had not seen Respondent for six months, she knew that he lived at 2616 Henderson Avenue in Wheaton. At 9:30 p.m. on Monday, June 13, Detective Edgar drove to the Henderson Avenue address and, finding no one at home, left his card in the mailbox. Either the same day or the next day, Detective Edgar contacted Respondent's father, Kenneth Lodowski, Sr., in College Park and was told that Respondent lived in Wheaton with his mother.

At 9:30 p.m. on Tuesday, June 14, Detectives Edgar and Hatfield drove to the Henderson Avenue address and there observed Respondent and his mother moving into the house. Edgar asked Respondent if he would accompany Edgar to the Criminal Investigation Division. Respondent agreed and drove there with his mother. He was interviewed and confirmed that he was Elfadl's roommate and that he had seen Elfadl with a shotgun in the past. Both Respondent and his mother were assured that he was not a suspect. Respondent and his mother left the Criminal Investigation Division at 1:00 a.m. on June 15.

At 4:00 p.m. on Thursday, June 16, Detectives Murphy and Edgar drove to Respondent's Henderson Avenue address and stated that they would like for him to accompany them again to the Criminal Investigation Division "so we could clear up some questions we had." Respondent then called his mother and told her of Detective Edgar's request.

Edgar then spoke with Respondent's mother, Paula Keane, told her that he was interested in Respondent as a witness and not as a suspect, and that he wished to speak with him for a couple of hours. Arrangements were then made for Respondent's father to meet him at the police station. Respondent's father spoke by phone with Detective Edgar and, according to Respondent's father, Edgar stated "there is no need for any lawyer." Respondent was driven to the Criminal Investigation Division by the detectives and arrived there at 6:00 p.m. Respondent's father was there when they arrived and spoke with Captain Fitzpatrick about Respondent's status. Captain Fitzpatrick said, "Mr. Lodowski, your son has nothing to worry about. He is a helpful citizen, not a suspect in this case." Respondent's father waited in the hallway while Respondent was interviewed and periodically inquired as to when Respondent could leave. Respondent's father left at approximately 9:00 p.m. after being assured, he said, that Respondent would be driven home by 9:30 at the latest. Respondent was interviewed by Detective Edgar in the Captain's office, where they ate pizza at approximately 2:00 a.m. At 6:00 p.m., Respondent left the C.I.D. and went home.

At 6:05 p.m., Detective Bruce Gentile finished typing Elfadl's statement wherein he fully admitted complicity in the robbery murder and fully implicated Respondent as the shooter of Officer Fletcher.

At approximately 7:00 p.m. that evening, Detective Edgar, aware that a warrant was being obtained for Respondent's arrest, called Respondent's home, spoke with his mother, and stated he "wanted to re-interview Kenny about some discrepancies."

Respondent's mother, Paula Keane, testified that she had made arrangements earlier that day for Respondent to see an attorney. At 9:00 a.m., she had advised Respondent that he should see an attorney, accompanied by his father. At 11:00 a.m., she telephoned Respondent's father and said she wanted Respondent to see an attorney, Eugene Zoglio, and requested that he pay for the lawyer's services. Mr. Lodowski replied that he was willing to pay for a lawyer even though the police had assured him that Respondent had no need for one. Mrs. Keane next spoke to Respondent at 3:00 p.m. but he had not yet contacted Mr. Zoglio. Respondent still owed Zoglio money from two prior traffic offense cases and was too embarrassed to call him. Mrs. Keane called Mr. Zoglio's office at 3:30 p.m. and spoke to the secretary. Mrs. Keane and Mr. Zoglio's secretary arranged for Respondent to meet Mr. Zoglio at 5:00 p.m. on June 20, the following Monday. Mrs. Keane testified that after Detective Edgar's telephone call, in which Edgar promised the interview would take no longer than two hours, she again called Mr. Zoglio's office and left two messages on the answering service, requesting that Zoglio come over to the police

station. However, Mr. Zoglio was not available that day to be reached personally.

Respondent and his mother arrived at the police station sometime between 8:15 and 9:00 p.m. Detective Edgar thanked them for coming and placed Respondent in an interview room. Edgar then returned to Respondent's mother and stated, "Have a seat. He will be here in a little while." He did not tell her that Respondent was under arrest nor that he was a suspect. Respondent's mother sat on the bench and waited. Edgar returned to the interview room and "stalled" him for about an hour while waiting for Detective Hatfield to be briefed on what had happened. At approximately 10:00 p.m., Edgar advised Respondent that he was under arrest. He denied Respondent's assertion that Respondent wished to leave and that he did not wish to talk.

Detective Hatfield arrived at 10:15 p.m. and saw Respondent's mother as he entered the police station. He was immediately told that an arrest warrant had been issued for Respondent, a fact which he did not communicate to Respondent's mother. Because Hatfield was rested, he was designated to interrogate Respondent. According to Hatfield, Respondent "kept talking about this being a joke, and that he couldn't believe this was happening, thought it was a dream, and he couldn't understand why we had him there and why we had a warrant for him..." According to Hatfield, at 10:19 p.m., Respondent executed a written waiver wherein he

acknowledged his understanding that he had a right to counsel and that he waived that right. Interrogation of Respondent then commenced with Detective Hatfield inquiring about Respondent's complicity and Respondent responding that he had been in Georgetown all that night but that he could not recall particular places or persons with whom he came in contact.

Meanwhile, while Respondent's mother watched, while she waited in the lobby, as attorney Trainor's renewed requests to see his client or at least to have Elfadl advised that the attorney was outside were denied. At approximately 8:50 p.m., Sgt. Bottjer advised Mr.Trainor that under no circumstances could he or Ms. Sleem see Elfadl and that he had not told Elfadl that his attorney was outside. Sgt. Bottjer's reasoning was that until the investigator feels the interview is over, the interview is in progress, and in that interim no attorney would be allowed to see his client if there has been a Miranda waiver and the suspect has not personally requested counsel. At that point, Mr. Trainor left the C.I.D. and returned home.

Shortly thereafter, Respondent's mother, Paula Keane, commenced a conversation in the lobby with a Colonel Vasco, who did not testify on the motion to suppress. According to Mrs. Keane, Colonel Vasco directed her to the administrative office where she would be more comfortable, and in response

to her questions assured her that Respondent had done nothing wrong and did not need an attorney. Mrs. Keane testified that Colonel Vasco left for a period and on his return at approximately 10:30 p.m. advised her, "your son is giving us good evidence." She stated that at approximately 2:30 a.m. on June 18, Vasco told her that Elfadl had confessed to killing the policemen. She said he suggested that they have breakfast and that when they returned she could take her son home. She said that she then saw her son in the hallway in the company of Sgt. Fletcher and Detective Edgar, that his eyes appeared glazed, that he seemed tired and that he said merely, "Hi Mom." Mrs. Keane testified that she then had breakfast with Colonel Vasco, who promised that when they returned, he would "go in and bring him out personally." When they returned to the C.I.D., she said, Colonel Vasco went inside and she waited outside for more than an hour. Finally, she said, she went inside, where she heard some conversation about her son, at which point Detective Edgar came into the lobby. Mrs. Keane testified that she told Edgar that she intended to get her son an attorney and that she wanted to see him and to take him home. At that point, she testified, Edgar replied "your son is a suspect." At this point it was approximately 6:00 a.m. Mrs. Keane then immediately returned to her mother's house in Rockville and called attorney James Kenkel. Mr. Kenkel testified that he received a telephone call from Mrs. Keane, an old family friend, at approximately 7:00 a.m. on Saturday, June 18. She

told him, he said, that her son was a suspect. He explained that, as District Public Defender for Prince George's County, he could not represent Respondent, but he suggested that he could, on her behalf, call attorneys William Brennan and Richard Sothoron. He did so immediately. Attorney Sothoron testified that he received Mr. Kenkel's telephone call at approximately 7:15 a.m. In response to that call, Mr. Sothoron and Mr. Brennan met at the C.I.D. in Forestville at approximately 8:10 a.m. whereupon they told Lt. Robert Miller that they were there on behalf of Respondent and wished to see him. Their request was denied.

Respondent at that point was in the process of writing a statement at the request of Detective Hatfield. Detective Hatfield had ceased his questioning of Respondent at 12:15 a.m. and began to question Elfadl as to the truth of his confession implicating Respondent. Elfadl explained by way of confirmation that after the murder, Respondent and he had eaten a meal at a Big Boy Restaurant on New Hampshire Avenue. Wishing confirmation of this assertion, Hatfield had Detective Ferriter take a photograph of Respondent and drive to the Big Boy where Ferriter was successful both in finding a copy of the check for the meal they had purchased and in obtaining an identification of Respondent as one who had dined at the Big Boy the night of the crime. Ferriter returned with this information at approximately 3:00 a.m., whereupon Hatfield resumed his questioning of Respondent and advised him of the new corroborative evidence. Hatfield

testified that Respondent continued to maintain, "this is all a joke. Somebody is playing a joke on me. I don't know anything about it." At that point, at approximately 3:15 a.m., Hatfield had Respondent change to a set of jail clothes and then said to him, "Well do you now think this is still a joke?" To which Respondent answered "no sir, I don't. I think its pretty serious." Questioning continued with Respondent responding "I can't believe this is happening." After further interrogation, Elfadl was brought into the room to confront Respondent with the assertion that Respondent was the other one involved in the case. Interrogation continued until approximately 6:00 a.m. when Respondent orally confessed to commission of the robbery with Elfadl and to shooting the police officer. At 6:18 a.m., Detective Hatfield gave Respondent a statement form on which Hatfield had typed a question asking Respondent to write what he knew about the incident. Respondent spent the next several hours writing a statement which detailed his relationship with Elfadl, Elfadl's purchase of a shotgun, and Elfadl's solicitation of him to rob the Mini-Mart. Sometime between 8:30 a.m. and 10:00 a.m., Detective Hatfield spoke with Mr. Sothoron and Mr. Brennan and learned of their desire to have contact with Respondent. He did not advise Respondent at any time that lawyers were at the police station trying to see him. Asked at the hearing on the motion to suppress as to whether he had been directed by someone else in his handling of the interrogation of Respondent,

Detective Hatfield stated that he "knew what had to be done" and that getting a statement from Mr. Lodowski "is obviously the ultimate thing you tried to do."

Shortly after 8:00 a.m., police officers arrived at Respondent's home in Wheaton and there executed a search warrant for the premises which issued in part upon the affiant's recitation of Elfadl's confession implicating Respondent. Having been denied access to their client, Mr. Sothoron and Mr. Brennan then contacted Mr. Kenkel to ask his help in having their access to Respondent ordered. In response, Mr. Kenkel first called District Court Judge Graydon McKee, who at 9:30 a.m. called Mr. Sothoron at the C.I.D. Mr. Sothoron explained the situation, and Judge McKee then called Lt. Miller and asked him if he would allow counsel to talk to their client. Judge McKee testified that Lt. Miller's responded that "they did have the person there, that who ever it was had waived his right to counsel, had not asked for an attorney, and he was not going to allow [counsel] to come in and talk to him." Judge McKee and Mr. Sothoron then spoke again by telephone, and it was agreed that Judge McKee would make himself available at noon to entertain a petition for habeas corpus ordering access by counsel to Respondent. Sometime between 8:30 a.m. and 9:30 a.m., after speaking with Judge McKee, Mr. Kenkel telephoned Arthur Marshall, State's Attorney for Prince George's County, and explained that the Prince George's County Police Department would not allow Mr. Sothoron or Mr. Brennan to

talk to Respondent. Mr. Marshall responded that he would be happy to speak with Mr. Brennan or Mr. Sothoron. At 9:45, Lt. Miller called and advised that Respondent "was being processed at that time, he had been advised of his rights by the Prince George's County Police Department, that he had not requested an attorney, and that they thought it was inappropriate to talk to counsel or to allow counsel to see Mr. Lodowski." At 9:55 a.m., Mr. Sothoron called Mr. Marshall and "asked if he could see his client." Mr. Marshall responded that he "thought the best thing would be to go ahead with his hearing" before Judge McKee.

At between 11:00 a.m. and noon, Detective Hatfield returned to the interview room to review the statement which Respondent was writing. At that time Detective Hatfield inquired whether Respondent was finished writing, and Respondent responded affirmatively. Detective Hatfield testified that he read the statement, asked Respondent why he stopped where he did, and that Respondent replied, "I don't want to say anything else. I think - I feel like I am cutting my own throat." Detective Hatfield said that he then asked Respondent to sign each page at the bottom. When Respondent asked why he had to sign them, Detective Hatfield responded "I would like you to sign them to show these are your handwritten pages, not somebody else's." Respondent replied, he said, "well I will sign it; but I will do it under protest." Each of the three handwritten pages bears Respondent's signature with the notation "signed

under protest!" Detective Hatfield denied Respondent's assertion that there had been a fourth page to the statement wherein Respondent recounted "that I had been refused a lawyer, that they won't let me sleep, my rights have been violated." Detective Hatfield also denied Respondent's assertion that the waiver of rights form, which indicates, in Detective Hatfield's writing, a signing time of 10:19 p.m. on June 17, was actually signed after 12:30 p.m. on June 18 in response to Detective Hatfield's advice that the document had to be signed before Respondent could be taken to a commissioner.

At 10:45 a.m., Mr. Sothoron's secretary arrived at the C.I.D. with typed copies of a petition for habeas corpus which had been dictated over the telephone. Mr. Sothoron and Mr. Brennan reviewed the petition, signed it, and gave it to their secretary for delivery to Judge McKee in Upper Marlboro. At 1:10 p.m., the police took Respondent from the C.I.D. to transport him to the Commissioner's office in Upper Marlboro. Mr. Sothoron testified that that was the first time he and Mr. Brennan saw Respondent and that "he seemed very exhausted, very disoriented. I briefly leaned over, told him I was an attorney and was representing him at his mother's request. And he didn't seem to understand that. And that is all that was said to him." Mr. Brennan and Mr. Sothoron then followed in their own car the police car which was transporting Respondent to the Commissioner's

office in Upper Marlboro. They arrived there at approximately 1:25 p.m.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the decision of the Court of Appeals of Maryland because of a conflict in the decisions of the courts which have considered the issue presented in the Petition and because the Court of Appeals did not use the "totality of the circumstances" approach adopted by some state courts. (Pet. 15,17.) Review of the decision below by this Court is unwarranted, however, because under any reasonable standard, be it the one adopted by the Court of Appeals or one analyzing the totality of the circumstances, the confession obtained from Lodowski would be ruled involuntary and inadmissible. In all of the cases applying the totality of the circumstances approach, the facts were unexceptionable: most involved fairly routine interrogations and the question of voluntariness arose solely from the fact that the existence of an attorney representing or purporting to represent the defendant was made known in some way to the police.

For example, in State v. Blanford, 306 N.W.2d 93 (Iowa 1981), the defendant, after committing two assaults and a burglary, surrendered himself to the authorities. After he was fully advised of his Miranda rights, he confessed. While the defendant was being questioned, an attorney requested that he be allowed to speak to the defendant.

The police were not told that the attorney represented the defendant. The court held that the police were under no obligation to let the defendant know that an attorney had asked to see him. 306 N.W.2d at 96. In Blanks v. State, ___ Ga. ___, 330 S.E.2d 575 (1985), the defendant was convicted of burglary, theft and murder with malice. Upon arrest, the defendant was twice fully advised of his Miranda rights and admitted the burglary and theft. The next day, after he was again advised of his rights, during a two hour interview the defendant admitted participating in the murders. During the second hour, the interrogating officers learned that an attorney was outside and wanted to speak to the defendant. The police continued the interview. After the interview, the defendant requested a lawyer and was allowed to talk to the attorney who had been retained by the defendant's father. The court found the confession voluntary, refusing to accept "a rule which would protect only those with the money and connections 'to bring a lawyer swiftly into the fray.'" 330 S.E.2d at 579, quoting Kasimar, Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo. L.J. 1, 95-96 (1978). In State v. Chase, 55 Ohio 2d 237, 378 N.E.2d 1064 (1978), the defendant was convicted of murder and voluntary manslaughter. After his arrest, the defendant was twice warned of his Miranda rights and twice waived them. The defendant confessed. At some point, two attorneys asked to see the defendant but the defendant was not informed of this fact.

The court held that the defendant's statements were not thereby rendered inadmissible since the police were never informed that the attorneys represented the defendant. 378 N.E.2d at 1069-70.

The totality of the circumstances approach has also been applied in reversing a conviction for failure to inform a defendant of the presence of an attorney at the police station while the defendant was being interrogated. In Dunn v. State, ___S.W.2d ___, Texas Court of Criminal Appeals, No. 248-84, decided June 26, 1985, the defendant, on the day following his father's death, was contacted by the Houston police and asked to come to the station after work. He arrived at 6:00 P.M. and was informed that he was a suspect in his father's death. He was given Miranda warnings and, after appearing in a lineup, was again informed of his rights. After three hours of questioning, at 10:35 P.M. a detective began typing the defendant's confession which the defendant signed at 12:17 A.M. The defendant was unaware at this time that police officers had prevented two lawyers from contacting him during questioning. Slip. op. at 2.

The defendant's wife had contacted attorney Schultz at 10:00 P.M. and requested that he go to police headquarters to represent her husband. Schultz called attorney Schneider, a criminal law specialist, who immediately called police headquarters and told one of the investigating detectives not to talk to the defendant until Schneider arrived and that he would be there in a few minutes. Schneider and

Schultz arrived at 11:00 P.M. and were given a pass to see the defendant. When they got to the jail area, they learned that the defendant was not in jail. They returned to the homicide division and learned that the defendant was being questioned in an adjacent room. The attorneys informed a Lieutenant Zoch that they had been retained by the defendant's wife to represent him. Zoch refused to tell the defendant of the attorneys' presence or to give the defendant their business cards. Zoch phoned an assistant district attorney for advice and was told that if the defendant had waived his right to counsel, the attorneys had no right to speak to him during questioning. Schneider attempted to send telegrams to the chief of police, all detectives connected with the case and the defendant but the telegrams were not delivered. After the defendant signed his confession, the attorneys were permitted to see him. Slip. op. at 2-4.

Examining the totality of the circumstances, the court noted that the attorneys did everything short of kicking in the door to see the defendant at a time when the defendant, if given a knowing and intelligent choice, clearly might have chosen to remain silent. The court concluded that this combination of circumstances prevented the defendant from making a knowing and intelligent waiver and that the confession was obtained in violation of the Fifth Amendment. Slip. op. at 12-14.

CONCLUSION

As the facts in the instant case set forth above demonstrate, under the totality of the circumstances analysis applied by the Texas Court of Criminal Appeals and advocated by the Petitioner, Respondent's confession was inadmissible. The same result would be reached under a Sixth Amendment analysis. Review by this Court, therefore, in the instant case is not warranted.

Respectfully submitted,

Alan H. Murrell
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
Tower Building, Fourth Floor
222 East Baltimore Street
Baltimore, Maryland 21202
(301) 659-4842

Julia Doyle Bernhardt
Assistant Public Defender

Counsel for Respondent

lv
8/6/85